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5 Attorneys for Defendants  
 6 TAKASHI WADA, M.D. and  
 7 CHARITY DEAN, M.D. in their  
 Official Capacities as Director and Health  
 Officer, respectively, of the Santa Barbara  
 County Department of Public Health

8  
 9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11  
 12 ANA WHITLOW, et al.,

Case No: 3:16-cv-01715-DMS-BGS

13  
 14 Plaintiffs,

**MEMORANDUM OF POINTS  
 AND AUTHORITIES OF  
 DEFENDANTS TAKASHI WADA,  
 M.D. AND CHARITY DEAN, M.D.  
 IN OPPOSITION TO  
 PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION**

15  
 16 vs.

[Fed. R. Civ. P. 65]

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 20 STATE OF CALIFORNIA,  
 21 DEPARTMENT OF EDUCATION, et  
 al.,

Hearing Date: Aug. 12, 2016  
 Time: 1:30 p.m.  
 Judge: Hon. Dana M. Sabraw  
 Courtroom: 13A (13<sup>th</sup> Fl. Carter/Keep)

22 Defendants.  
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**INTRODUCTION**

1  
2 Plaintiffs’ lawsuit arises from the impact a change in California law is  
3 having on the ability of parents to enroll children in school. Senate Bill 277  
4 reduced the available avenues to school admittance for unimmunized children.  
5 Parents may no longer rely on the personal belief exemption due to the repeal of  
6 California Health and Safety Code section 120365. Medical exemptions from  
7 immunization remain available.

8 Plaintiff’s Motion for Preliminary Injunction (“Motion”) seeks  
9 preliminary protection from both the repeal of the personal belief exemption and  
10 enforcement of medical exemption requirements, which is a long-standing  
11 responsibility of school officials and not newly established under Senate Bill  
12 277. Motion, p. 3, ¶¶ A, B, C, D, E, F.

13 The law setting forth the required content of a medical exemption has  
14 existed since 1961. Plaintiffs’ request to enjoin school officials from scrutinizing  
15 and rejecting a medical exemption not meeting statutory requirements is  
16 unwarranted. This would prevent school officials from rejecting a medical  
17 exemption written by a nurse practitioner rather than a licensed physician, or a  
18 medical exemption omitting to state the vaccine from which a child is being  
19 exempted. In either instance, the medical exemption would not meet statutory  
20 requirements.

21 To the extent Plaintiffs’ Motion seeks to enjoin Defendants from rejecting  
22 a medical exemption otherwise meeting statutory requirements on grounds that  
23 the medical basis for granting it is insufficient, Plaintiffs lack standing to seek a  
24 preliminary injunction against the County of Santa Barbara. No Santa Barbara  
25 County resident Plaintiff has a medical exemption. Moreover, Plaintiffs’  
26 evidence establishes that the County of Santa Barbara does not review medical  
27 exemptions to determine whether or not they are warranted medically. In  
28 addition, no Santa Barbara County resident Plaintiff alleges that Santa Barbara

1 County has taken action or intends to take action that threatens any Santa  
 2 Barbara County parent or child with harm. Finally, Plaintiffs' suit establishes no  
 3 grounds to enjoin the County of Santa Barbara from reviewing medical  
 4 exemptions provided by schools with all personally identifiable information  
 5 redacted. The Motion should be denied as against County of Santa Barbara.

### 6 **STATEMENT OF FACTS AND ALLEGATIONS**

7 Immunization of California school children has been required since at  
 8 least 1961. Cal. Health & Safety Code § 3380 (effective Sept. 15, 1961). Also  
 9 since that time, California has provided for both personal belief exemptions  
 10 ("PBE") and medical exemptions ("ME") from immunization requirements. Cal.  
 11 Health & Safety Code §§ 3384, 3385 (effective Sept. 15, 1961).

12 California immunization law changed with the passage of Senate Bill 277  
 13 ("SB277") in 2015. SB277 eliminated PBEs through repeal of California Health  
 14 and Safety Code section 120365, effective January 1, 2016. MEs remain  
 15 available in California. SB277 made limited amendments to California Health  
 16 and Safety Code section 120370, which provides for MEs.

17 Santa Barbara County's Public Health Department ("SBCPHD") recently  
 18 initiated its Medical Exemption Pilot Program ("MEPP"). MEPP provides for  
 19 SBPHD to review MEs filed with Santa Barbara County ("County") schools to  
 20 ensure that they contain five required statutory elements. These are: 1) issuance  
 21 by a Doctor of Medicine or Doctor of Osteopathic Medicine; 2) a statement that  
 22 the physical condition or medical circumstances of the child are such that the  
 23 required immunization(s) is not considered safe; 3) identification of the  
 24 vaccine(s) from which the child is exempted; 4) a statement of whether the  
 25 medical exemption is permanent or temporary; and 5), if the medical exemption  
 26 for a vaccine is temporary, a date that the temporary exemption expires. MEPP  
 27 requires that schools redact all personally identifiable information from MEs  
 28 prior to transmission to SBCPHD. *See* Exhibit 3 to Declaration of Gregory J.

1 Glaser in Support of Plaintiffs’ Motion for Preliminary Injunction (Glaser  
 2 Decl.).<sup>1</sup> Under MEPP, “[d]etermining if a ‘physical condition’ or ‘medical  
 3 circumstance’ warrants exemption from vaccination” would not be part of the  
 4 County’s review. Glaser Decl., Ex. 3, p. 1.

5 Two Plaintiff parents are alleged to be County residents. First Amended  
 6 Complaint (“FAC”), ¶¶ 11-27. These are Melanie Sunukjian, mother of A.L.S., a  
 7 seventh grader (FAC, ¶ 17) and Douglas Mackenzie, M.D., parent of two-year-  
 8 old preschooler G.J.M. FAC, ¶ 26. Ms. Sunukjian alleges that A.L.S. needs a  
 9 vaccine to enroll in the seventh grade. FAC, ¶ 17. Mr. Mackenzie alleges that  
 10 G.J.M. attends preschool with a PBE “but will be denied entry into kindergarten  
 11 if SB 277 remains in effect.” FAC, ¶ 26.<sup>2</sup>

12 Plaintiffs’ Motion is supported by one declaration from a County resident.  
 13 Plaintiff Sunukjian states that she seeks to obtain a medical exemption for  
 14 A.L.S. and is concerned that **if** she obtains one, SBCPHD “will seek to review  
 15 and nullify a medical exemption . . . .” Sunukjian Decl., ¶ 10. Ms. Sunukjian  
 16 says that she is “informed that the Santa Barbara County Health Department has  
 17 established a program to review and reject medical exemptions.” *Id.* at ¶ 11. Ms.  
 18 Sunukjian’s declaration is dated July 12, 2016, which is over two weeks after  
 19 SBCPHD issued its June 24, 2016 letter establishing the operative MEPP and  
 20 stating that it would not overturn medical exemptions. *See* Glaser Decl., Ex. 3.

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21 <sup>1</sup> The MEPP as described in Exhibit 3 to the Glaser Declaration  
 22 superseded and replaced the original MEPP, which the SBCPHD modified in  
 23 response to Mr. Glaser’s stated concerns. *See* Glaser Decl., Ex. 1 and 2.

24 <sup>2</sup> Pursuant to California Health and Safety Code section 120335(g), as a  
 25 child already attending preschool with a PBE, G.J.M. cannot be denied  
 26 enrollment for lack of immunization until he reaches the next “grade span.” *See*  
 27 Cal. Health & Safety Code § 120335(g)(1) and (g)(2). G.J.M. is a few years  
 28 away from kindergarten. *See* Cal. Educ. Code § 48000(a) (providing that a child  
 shall be admitted to public school kindergarten at the beginning of a school year  
 if he will have his fifth birthday on or before September 1.)

## ARGUMENT

### I. PLAINTIFFS LACK STANDING TO SUE THE COUNTY.

Article III of the United States Constitution limits the judicial power of the United States to the resolution of “Cases” and “Controversies.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). This fundamental limitation on judicial power is reflected in the doctrine of standing. *Id.* at 493. To seek injunctive relief, the doctrine of standing requires that a plaintiff “show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendants; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Id.*

SBCPHD is a County department. Therefore, the only Plaintiffs who could be affected by any SBCPHD action are Ms. Sunukjian and A.L.S. and Dr. Mackenzie and G.J.M. Plaintiffs submitted no declaration from Dr. Mackenzie establishing that he or his son are under any actual or imminent threat of suffering any County caused injury. Dr. Mackenzie’s unsworn allegations in the First Amended Complaint are not evidence and therefore do not support standing at the preliminary injunction stage. *Doe v. National Board of Medical Examiners*, 199 F.3d 146, 152-153 (3<sup>rd</sup> Cir. 1999).

Plaintiffs did submit Ms. Sunukjian’s declaration. She admits that she has not obtained a medical exemption for her daughter. Sunukjian Decl., ¶ 10. Thus, she cannot have filed an exemption with her daughter’s school; the school cannot have transmitted an exemption to the County for review; and neither Ms. Sunukjian nor her daughter can be under any actual or imminent threat of suffering any injury caused by the County. Ms. Sunukjian’s hypothetical concern that **if** she obtains a medical exemption for her daughter, the SBCPHD will seek to review and nullify that exemption, does not suffice to establish standing. Her hypothetical concerns emphasize the reason behind the standing

1 doctrine, which is to limit judicial review to matters demonstrating a real need  
 2 for the exercise of judicial power to protect the interests of the complaining  
 3 party. *Summers*, 555 U.S. at 493.

4 Ms. Sunukjian’s concerns are not only hypothetical but are unfounded.  
 5 She explains that her concerns arise because she is “informed that the Santa  
 6 Barbara County Health Department has established a program to review and  
 7 reject medical exemptions.” Sunukjian Decl., ¶ 11. This statement in a  
 8 declaration dated July 12, 2016 is contradicted by other evidence submitted in  
 9 Plaintiffs’ Motion. Plaintiffs’ counsel are aware that County issued a letter over  
 10 two weeks prior to the date of Ms. Sunukjian’s declaration stating that under  
 11 MEPP, SBCPHD would not review medical exemptions to determine whether a  
 12 physical condition or medical circumstance existed warranting exemption from  
 13 vaccination; and would not overturn any medical exemptions issued by a  
 14 licensed physician. Glaser Decl., Ex. 3, p. 1.

15 Ms. Sunukjian’s concerns are thus contradicted by other evidence  
 16 presented by Plaintiffs. Ms. Sunukjian does not state whether or not she was  
 17 aware of County’s June 24, 2016 letter when she signed her declaration,  
 18 however Plaintiffs’ counsels’ submission of her declaration certainly raises a  
 19 Rule 11 question.

20 Notably, Plaintiffs present no evidence in support of their Motion  
 21 evidencing that through County action, any licensed physician is threatened by  
 22 the loss of his or her medical license.

23 **II. EVEN IF PLAINTIFFS HAD STANDING, THEY COULD NOT**  
 24 **MEET THEIR BURDEN TO ESTABLISH LEGAL GROUNDS**  
 25 **FOR A PRELIMINARY INJUNCTION AGAINST THE COUNTY.**

26 In order to obtain a preliminary injunction, Plaintiffs must establish that:  
 27 (1) they are likely to succeed on the merits, (2) that they are likely to suffer  
 28 irreparable harm without preliminary relief, (3) that the balance of equities tips  
 in their favor, and (4) that an injunction is in the public interest. *Winter v.*

1 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary  
 2 injunction is an “extraordinary remedy that may only be awarded upon a clear  
 3 showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

4 **A. Plaintiffs cannot establish that they are likely to succeed against  
 5 County on the merits.**

6 The first factor under the applicable test is the most important. As a  
 7 threshold inquiry, if Plaintiffs fail to show the likelihood of success on the  
 8 merits, the court need not consider the remaining three parts of the test. *Garcia*  
 9 *v. Google, Inc.*, 786 F.3d 733, 740 (9<sup>th</sup> Cir. 2015).

10 Plaintiffs’ case against the County appears to arise from Plaintiffs’  
 11 assertion that “some local health departments are providing schools with  
 12 incorrect information about exemptions, causing illegal scrutiny and rejections  
 13 of physician-provided medical exemptions.” Motion Points and Authorities,  
 14 9:14-10:2. Plaintiffs rely on the Glaser Declaration and on declarations of  
 15 parents who reside outside County. *See* Schultze-Alva Decl. ¶ 1; Owens Decl., ¶  
 16 1; Sutton Decl. ¶ 1; Hogan Decl., ¶ 1. Ms. Sunukjian, the only County declarant,  
 17 does not have a medical exemption. Sunukjian Decl., ¶ 10. These declarations  
 18 do not support Plaintiffs case against County.

19 1. Plaintiffs’ First through Eleventh Claims are Unrelated to  
 20 Any County Action so that Plaintiffs Cannot Succeed on  
 21 these Claims as against County.

22 Plaintiffs’ first through eleventh claims for relief state that they are  
 23 brought against “all defendants.” These claims are for (1) violation of freedom  
 24 of religion, assembly and parental rights under the First and Fourteenth  
 25 Amendments; (2) violation of equal protection under the Fourteenth  
 26 Amendment; (3) violation of Due Process under the Fifth and Fourteenth  
 27 Amendments; (4) violation of the Individuals with Disabilities Education Act;  
 28 (5) violation of Section 504 of the Rehabilitation Act of 1973; (6) violation of  
 the Americans with Disabilities Act; (7) violation of Title VI of the Civil Rights

1 Act of 1964; (8) violation of Article IX, Sections 1 and 5 of the California  
2 Constitution; (9) violation of the equal protection clauses of the California  
3 Constitution, Article I, Section 7(a) and Article IV, Section 16(a); (10) violation  
4 of the Due Process Clauses of the California Constitution, Article I, Sections  
5 7(a) & 15; and (11) violation of Education Code section 51004. All of these  
6 claims are arise from impacts of Senate Bill 277’s repeal of the PBE and not  
7 from any County action. Plaintiffs allege no facts that County has denied  
8 enrollment or education to any child and cannot prevail on any of these claims  
9 against County.

10 2. Plaintiffs Cannot Succeed on their Twelfth Claim for Relief  
11 as against County because MEPP Requires that all Medical  
12 Information be Redacted before Transmittal of Medical  
13 Exemptions to County.

14 Plaintiff’s twelfth claim for relief alleges violation of the Confidentiality  
15 of Medical Information Act (“CMIA”) set forth in California Civil Code section  
16 56, et seq. Specifically, Plaintiffs allege that “Defendants’ conduct, including  
17 gathering medical exemption information to substantively review those  
18 exemptions, violates the CMIA.” FAC, ¶ 180. Under the CMIA, “medical  
19 information” means “any individually identifiable information.”

20 “Individually identifiable” means that the medical information  
21 includes or contains any element of personal identifying  
22 information sufficient to allow identification of the individual, such  
23 as the patient’s name, address, electronic mail address, telephone  
24 number, or social security number, or other information that, alone  
25 or in combination with other publicly available information, reveals  
26 the individual’s identity.

27 Cal. Civil Code § 56.05(j). MEPP requires school officials to redact all personal  
28 identifying information so the County obtains no “medical information” through  
MEPP and Plaintiffs cannot prevail on this claim against County.

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3. Plaintiffs Cannot Succeed on their Thirteenth Claim for Relief as against County because the California Information Practices Act does not Apply to County.

Plaintiffs’ thirteenth claim for relief alleges violation of the California Information Practices Act (“CIPA”) set forth in California Civil Code section 1798, et seq. Specifically, Plaintiffs allege that “Defendants’ conduct, including collecting, maintain, and distributing the students’ personal information, violates the IPA.” FAC, ¶ 185.

CIPA applies to “agencies” as that term is defined in California Civil Code section 1798.3 (b). As defined by CIPA, “agency” does not include a local agency as defined in Government Code section 6252(a). Cal. Civil Code § 1798.3(b)(4). Under Government Code section 6252(a), a county is a “local agency.” Therefore, CIPA does not apply to the County and Plaintiffs cannot prevail on this claim against County.

4. Plaintiffs Cannot Succeed on their Fourteenth Claim for Relief as against County because MEPP Requires that all Medical Information be Redacted before Transmittal of Medical Exemptions to County.

Plaintiffs’ fourteenth claim for relief alleges violation of California Health and Safety Code section 120440. Plaintiffs allege that “Defendants’ conduct, including requiring or coercing Plaintiffs to permit sharing of records relating to the exemptions, violates § 120440.” FAC, ¶ 189. California Health and Safety Code section 120440(c) provides for disclosure of certain information, including personally identifiable information, unless a refusal to permit recordsharing of the listed information is made. Cal. Health & Safety Code § 120440(c) and (e). County’s MEPP requires school officials to redact all personal identifying information so that transmitting redacted MEs to County does not constitute recordsharing of patient information listed in California Health and Safety Code section 120440(c)(1) to (10) and Plaintiffs cannot prevail on this claim against County.

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5. Plaintiffs Cannot Succeed on their Fifteenth Claim for Relief as against County because MEPP Requires that all Personally Identifiable Information be Redacted before Transmittal of Medical Exemptions to County.

Plaintiffs’ fifteenth claim for relief alleges violation of the Federal Family Educational Rights and Privacy Act (“FERPA”). Plaintiffs allege that “Defendants’ conduct, including collecting medical records relating to the exemption, violates FERPA and applicable regulations.” FAC, ¶ 195. FERPA provides that records can be released “without the written consent required by [34 C.F.R.] § 99.30 after the removal of all personally identifiable information provided to the education agency or institution . . . .” 34 C.F.R. § 99.31(b)(1). “Personally identifiable information” is defined in 34 C.F.R. § 99.3 and includes, among other things, a student’s name, address, social security number, birthdate, mother’s maiden name. Plaintiffs cannot prevail on this claim against County because County’s MEPP requires school officials to redact all personal identifying information before transmitting MEs to County.

6. Plaintiffs Cannot Succeed on their Sixteenth Claim for Relief as against County because County’s MEPP is not Illegal.

Plaintiffs’ sixteenth claim for relief alleges violation of California Code of Civil Procedure 526a. California Code of Civil Procedure 526a “permits a taxpayer action to enjoin illegal governmental activity or the illegal expenditure or waste of public funds.” *Lyons v. Santa Barbara County Sheriff’s Office*, 231 Cal.App.4<sup>th</sup> 1499, 1502 (2014). Where challenged governmental conduct is legal, there are no grounds for a taxpayer action. *Id.* at 1503. As set forth above, Plaintiffs have failed to show any unlawful acts by County and therefore have not alleged any illegal County activity or illegal expenditure or waste of public funds. Plaintiffs therefore also cannot prevail on their sixteenth claim for relief against County.

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**B. Plaintiffs cannot demonstrate a likelihood of suffering irreparable harm from County before a decision on the merits can be rendered.**

Plaintiffs seeking a preliminary injunction must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22. It is not sufficient to demonstrate merely a possibility of injury. *Id.* As discussed above, Plaintiffs present no evidence that any County Plaintiff has any likelihood of suffering irreparable harm from the County through MEPP.

**C. Plaintiffs fail to establish that the balance of equities tips in their favor or that an injunction against County is in the public interest.**

Plaintiffs’ failure to present evidence that County’s MEPP threatens harm demonstrates the absence of any interest weighting Plaintiffs’ side of an equities scale. Furthermore, the County’s role as immunization program provider, its responsibility to protect public health, and its ability, through MEPP, to gain timely information about any changes in the immunization landscape in Santa Barbara County all establish that enjoining the County’s MEPP is not in the public interest.

**CONCLUSION**

County of Santa Barbara respectfully requests that the Court deny Plaintiffs’ Motion to the extent it seeks to preliminarily enjoin County from reviewing redacted MEs transmitted by County school officials.

Dated: August 1, 2016

MICHAEL C. GHIZZONI  
COUNTY COUNSEL

By: /s/ - Amber Holderness  
Amber Holderness  
Deputy County Counsel  
Attorneys for Defendants  
TAKASHI WADA, M.D. and  
CHARITY DEAN, M.D. in their Official  
Capacities as Director and Health  
Officer, respectively, of the Santa Barbara  
County Department of Public Health

**PROOF OF SERVICE**  
**STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA**

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 105 East Anapamu Street, Santa Barbara, California.

On July 29, 2016, counsel for Plaintiffs were served a true copy of the within **MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS TAKASHI WADA, M.D. AND CHARITY DEAN, M.D. IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** by electronic mail.

On August 1, 2016, I served a true copy of the within **MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS TAKASHI WADA, M.D. AND CHARITY DEAN, M.D. IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on the Interested Parties in this action by:

by mail. I am familiar with the practice of the Office of Santa Barbara County Counsel for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above mentioned document would have been deposited with the United States Postal Service, after having been deposited and processed for postage with the County of Santa Barbara Central Mail Room.

by electronic transmission via CM/ECF to the persons indicated below:

**SEE ATTACHED SERVICE LIST**

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on August 1, 2016, at Santa Barbara, California.

/s/ - D'Ann Sjovold  
\_\_\_\_\_

D'Ann Sjovold

SERVICE LIST

*Whitlow v. State of California, et al.*

Case No: 3:16-cv-01715-DMS-BGS

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